

NO. PD-0638-17

**TO THE COURT OF CRIMINAL APPEALS
OF THE STATE OF TEXAS**

FILED
COURT OF CRIMINAL APPEALS
12/27/2017
DEANA WILLIAMSON, CLERK

RODERICK BEHAM,

Appellant

v.

STATE OF TEXAS,

Appellee

**Appeal from Bowie County
Cause No. 06-16-00094-CR**

APPELLANT'S BRIEF ON THE MERITS

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IDENTITY OF PARTIES AND COUNSEL

The parties to the trial court's judgment are the State of Texas and Appellant, Roderick Beham.

The trial judge was the Hon. Bill Miller, Presiding Judge, 5th District Court, Bowie County, Texas.

Counsel for Appellant at trial were Bowie County Public Defenders Chad Crowl and Will Williams, 424 West Broad Street, Texarkana, Texas 75501.

Counsel for Appellant before the Court of Appeals was Alwin A. Smith, 602 Pine Street, Texarkana, Texas 75501

Counsel for the State at trial were Assistant District Attorneys, Lauren Richards and Kelley Crisp, 601 Main Street, Texarkana, Texas 75501

Counsel for the State before the Court of Appeals was Assistant District Attorney Lauren Richards, 601 Main Street, Texarkana, Texas 75501.

Counsel for the State before this Court is Emily Johnson-Liu, Assistant State Prosecuting Attorney, P.O. Box 13046, Austin, Texas 78711.

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STATEMENT OF THE CASE

The Appellant was convicted of Aggravated Robbery, however, his original sentence was reversed and he was ordered to have a new trial on punishment. C.R. pg. 21. On his retrial of punishment the State offered testimony of Appellant's gang membership which the Court of Appeals found to be inadmissible and reversed his punishment for a second time. Beham v. State, No. 06-16-00094-CR, 2017 Tex. App. LEXIS 4595 (Tex. App. – Texarkana May 19, 2017).

STATEMENT REGARDING ORAL ARGUMENT

Counsel for Appellant does not believe that oral argument is necessary for the Court to make a ruling in this matter.

ISSUES PRESENTED

REPLY POINT NUMBER ONE

The Testimony of the Appellant's Holding Himself out as Being in a Gang Was Not the Intent of the Questioning by the State but That the Appellant Was a Gang Member

REPLY POINT NUMBER TWO

The Court of Appeals Did Not Err in Failing to Isolate the Opinion Testimony from the Photographs upon Which the Opinion Was Based Because the State offered no other testimony regarding the photographs

REPLY POINT NUMBER ONE

THE TESTIMONY OF THE APPELLANT’S HOLDING HIMSELF OUT AS BEING IN A GANG WAS NOT THE INTENT OF THE QUESTIONING BY THE STATE BUT THAT THE APPELLANT WAS A GANG MEMBER

Summary of the Argument

The State argues that it was not offering “conventional gang membership evidence” but wants this Court to accept that the evidence was an “insight” into how the Appellant wanted others to perceive him and his potential future criminal behavior. (State’s brief pg. 8). The only problem with this assertion is that it requires the jury to believe he is actually a gang member.

The Court of Appeals saw through this subterfuge by examining the actual testimony elicited from the “expert” and ruled that testimony offered was clearly more prejudicial than probative.

In its first point, the State attempts to convince this Court that the testimony of the Arkansas officer should have been admissible as “character” evidence and was therefore relevant to sentencing by the jury under Article 37.07, when in fact the sole purpose of the testimony was to portray the Appellant as a gang member without being able to meet the evidentiary

requirements of *Sierra v. State*, 266 S.W.3d 72, 79 (Tex. App. Houston [1st Dist.]) and *Beasley v. State*, 902 S.W.2d 452, 456 (Tex.Crim.App. 1995).

Statement of the Facts

Prior to the testimony of Officer Kirkland, an Arkansas “gang unit” officer, the trial court conducted a hearing outside the presence of the jury. (R.R. vol. 3, pg. 178). During the testimony in this hearing the following exchange took place:

Question (By the Prosecutor): And do you have specific knowledge about Roderick Beham being in an illegal street gang?

Answer: I personally do not have personal knowledge of that.

Question: So let’s say, for example -- what are the implications of an individual holding themselves out to be in an illegal street gang who is not in fact a member of that gang?

Answer: No, ma’am. You -- generally, you do not have someone that tries to hold himself out to be in something that they are not.

Question: So although you may not have specific knowledge to say without a doubt that Roderick Beham -- you know him to be in a gang. By all indications, he is holding himself out to be in a street gang.

Answer: Yes, ma’am. I can say this. If I, if this was brought to my attention, this would cause me to put him under a much more close scrutiny and start surveilling and building a intelligence file on him.

Question: And again, it's your opinion that based on the totality of the evidence that he is either a member or putting himself out to be a member of a street gang?

Answer: Yes, ma'am.

(R.R. vol. 3, pgs. 181-2).

Then, again in front of the jury, the prosecutor elicited the same testimony from the Arkansas officer.

Question: (By the Prosecutor) And I want to talk about what kind of implications would come with a person holding himself out to be in a gang and they are in fact not a member of that gang.

Answer: We -- it's kind of a double-edge sword. If you put yourself out there to be in a gang, one, you put a spotlight on yourself for law enforcement to begin investigating you further, putting you under surveillance, and you also run the risk of whoever's territory that is that your purporting to be, whatever gang that you're in, if you're not, then they will probably have some problems with you purporting to be in that gang if you are indeed not. Gangs are very territorial. It may go from a few block area to half the city area, but they're very territorial, and they just don't allow people to come in and make claims that they are part or indeed in that gang.

Question: So it would not be advisable for one who's not a member of a gang to hold themselves out as being a member of that gang?

Answer: No, ma'am.

(R.R. vol. 3, pgs. 198-9).

Clearly, the import of the testimony by the Arkansas officer was to

convey to the jury that the Appellant was in a criminal street gang because no one would portray themselves as being a gang member unless they actually were.

On appeal below, the Court of Appeals correctly reasoned that what the State was in fact attempting to do was to portray the Appellant as a gang member without having any evidence that he was a gang member. The Court of Appeals correctly saw through the subterfuge presented by the State in the trial court and based upon the sound reasoning in Sierra, found that the testimony of Officer Kirkland was inadmissible. Beham 2017 Tex. App. LEXIS 4595, at 8-9.

ARGUMENT

The expert testimony was not admissible as “character” evidence as it violated the restrictions of Article 37.07 and Sierra.

While Article 37.07, of the Code of Criminal Procedure, gives the trial court considerable discretion when it comes to admitting punishment evidence, that discretion is not without limits. “Article 37.07, does not give the trial court unfettered discretion to admit all proffered punishment evidence; the trial court’s discretion is necessarily limited by the requirements that

punishment evidence must be admissible under the rules of evidence and not be excluded under some statute or rule.” Ellison v. State, 201 S.W.3d 714, 722 (Tex. Crim. App. 2006).

The corner stone of Article 37.07, is to provide the jury with “complete information” to allow it to tailor an appropriate punishment to the defendant in front of them. Erazo v. State, 144 S.W.3d 487, 491 (Tex. Crim. App. 2004).

Evidence of membership in a gang is relevant as it comes under the type of “bad acts” relevant to sentencing. Sierra v. State, 266 S.W.3d 72, 79 (Tex. App. Houston [1st Dist.]). In Sierra, the Houston court found that the defendant’s admission to being in a gang, his association with gang members, his arrest with gang members and tattoos were sufficient for the witness to testify that the defendant was in a particular gang. Id at 77.

What the courts have consistently held is that, it is the membership in a gang, that is the character evidence a jury should be allowed to know about. That is what makes the evidence admissible. See Beasley v. State, 902 S.W.2d 452, 456 (Tex. Crim. App. 1995).

The State would have this Court rule that anything, as here, the trial court determines is relevant at punishment should be admitted regardless of how tenuous or absurd the evidence is. This Court has consistently, and

correctly, ruled that this is not the case. Erazo at 491.

Had the State offered the photographs depicting the Appellant in State's 11, in front of the money and suspected marijuana or State's 12, with his friends holding the gun, the argument here would be quite different. Additionally, had the State offered State's 9 and 10, supposedly showing the Appellant "flashing gang signs", the trial court might have been on firmer ground. That, however, is not what the State did. They offered the exhibits, and without any further information than what was portrayed in the photos had the Arkansas officer to suggest to the jury in this case that the Appellant was a gang member because no one would hold themselves out to be in a gang unless they really were in one.

With nothing further, the Court of Appeals was correct to rule that the evidence should not have been presented to the jury.

REPLY POINT NUMBER TWO

THE COURT OF APPEALS DID NOT ERR IN FAILING TO ISOLATE THE OPINION TESTIMONY FROM THE PHOTOGRAPHS UPON WHICH THE OPINION WAS BASED BECAUSE THE STATE OFFERED NO OTHER TESTIMONY REGARDING THE PHOTOGRAPHS

The sole reason for the State's introduction of Exhibits 8 through 12 was to set up Officer Kirkland's opinion that the Appellant was a violent gang member. The Court of Appeals correctly saw through this subterfuge and found that the testimony was inadmissible and that it harmed the Appellant. *Beham v. State*, 2017, Tex. App. LEXIS 4595 at 14-5.

The State's argument that the Court of Appeals should have limited its analysis to Officer Kirkland's testimony alone belies the facts and the testimony. Without State's exhibits 8 through 12, Officer Kirkland had no opinion. His entire presentation about the exhibits were how they showed "gang affiliation" or membership not the mere matters that they displayed. The exhibits do not speak for themselves. They only have import because of the explanation given to them by the officer.

The opposite also holds true. Without the exhibits, Officer Kirkland's testimony is meaningless.

To argue that the exhibits and the officer's testimony are the same

evidence defies reason.

PRAYER FOR RELIEF

It is for the reasons stated herein that the Appellant prays that this Honorable Court affirm the decision of the Texarkana Court of Appeals, and remand this cause for a new trial on punishment.

Respectfully submitted,

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Certificate of Compliance

Pursuant to the Tex. R. App. P. 9.4(i)(3), I hereby certify that this brief contains 1,474 words (excluding the caption, table of contents, table of authorities, signature of proof of service, certification and certificate of compliance). This is a computer-generated document created in Wordperfect, using 14 point typeface for all text. In making this certificate of compliance, I am relying on the word count provided by the software used to prepare the document.

/s/Alwin A. Smith

Alwin A. Smith

Certificate of Service

This is to certify that a true and correct copy of Appellant's Brief has been forwarded to the Appellant, Roderick Beham, #01954068, Gib Lewis Unit, 777 FM 3497, Woodville, TX 75990 and Stacy M. Soule, State Prosecuting Attorney and Emily Johnson-Liu, Assistant State Prosecuting Attorney, P.O. Box 13046, Austin, Texas 78711, on this the 27th day of December 2017, by placing the same in the U.S. Mail or by email.

/s/Alwin A. Smith

Alwin A. Smith